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No. 80-1949

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1980

B.F. and S.F.
"B.F. and S.F. as next friends of P.F., brother of T.A.F., and as members of and on behalf of the extended family of T.A.F., J.P.L., J.L., E.M., P.M., J.M., & M.M."
J.L., J.E.L., E.M., P.M., J.M., and M.M.,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of T.A.F., a child,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTION PRESENTED

1. Whether a child's own brother[1/] and/or his aunt and uncle, and/or his grandparents, and/or his godparents, and/or his extended family, by rules of procedure can be denied standing to challenge the constitutional validity of trial court's proceedings in dependency and neglect and termination of the child's and his brother's parental rights and total severance of visitation when the trial court proceedings were infirm in that they deprived the child and his relatives of fundamental rights guaranteed by the constitution and laws of the United States.

1/ The petitioners allege that not only B.F. and S.F. are parties herein not denied by the representatives of the People of the State of Colorado, but petitioners also allege that P.F., the brother of T.A.F., is a party since B.F. and S.F., aunt and uncle of P.F., acted as P.F.'s next

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friend, which was clearly pointed out by Judge Berman in his dissent, 624 P.2d 349 (1980). See Appendix A, p. 11a et seq. The Petitioners also allege that insofar as the child, T.A.F.'s interests are concerned, his extended family on the maternal side includes: grandmother, grandfather, six aunts, five uncles, twenty-nine cousins, all descendants of early Spanish settlers of the Southwest and the Pueblo and Navajo Indian Tribes.

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In the Interest of T.A.F., a child,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

The petitioners pray that a writ of certiorari issue to review the judgment of the Colorado Court of Appeals entered in the above case on August 28, 1980.

OPINION BELOW

Colorado, in the Interest of T.A.F. v. B.F., et al., Colo. App. 624 P.2d 349.
Decided Aug. 28, 1980.
Rehearing Denied Oct. 23, 1980.
Certiorari Denied Feb. 17, 1981

UNREPORTED DECISIONS

B.F., et al. v. Colorado, in the Interest of T.A.F., Supreme Court of the United States, A-794.
Application for stay addressed to Justice Brennan and referred to Court denied April 16, 1981, after application for stay addressed to Justice White denied March 20, 1981.

Colorado, in the Interest of T.A.F. v. B.F., et al., supra.
Stay by Colorado Supreme Court of mandate. Mandate to be issued March 24, 1981, unless stayed by U.S. Supreme Court.

CONSTITUTIONAL PROVISION AND STATUTES

Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor sha-l any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, U.S.C. Section 1257(3). Supreme Court Jurisdiction; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immuni'y is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

JURISDICTION

This Court's jurisdiction in the present case is founded upon 28 U.S.C. Section 1257(3) which gives this Court authority to review, by writ of certiorari, a state judgment of the Colorado Court of Appeals in a civil case when a federal right is claimed, which, if recognized and enforced, would require a different state judgment. See Chicago B&Q R. Co. v. Illinois, 200 U.S. 561, 26 S.Ct. 341 (1906).

A litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rules serves a legitimate State interest. Henry v. Mississippi, 379 U.S. 443, 447-48, 85 S.Ct. 564, 567 (1965). Thus, the Court may also ask whether the enforcement of a procedural

forfeiture (e.g., failure to intervene in termination proceedings; failure to pursue other available remedies) serves such a state interest.

State law is never fully independent; the power of state courts to apply state law is always subject to federal control. 16 Wright and Miller, Federal Practice and Procedure, Jurisdiction at 675. The weighing of competing federal and state interests must be tailored to each particular question. "There is no doubt that this delicate task must be a central part of the court's function." Id. at 676. The rationale for this general policy is as follows. There is always the danger that independent federal rights may be defeated if state courts are accorded an unreviewable power to moot the federal question, either by resorting to alternative state substantial grounds, or by

finding a state procedural reason for refusing to consider the federal claim. "As a matter of necessity, then, it is well settled that the independence and adequacy of a state ground is itself a federal question, to be determined by the Supreme Court." Id. Thus, it is the Court's duty to ascertain whether the procedural grounds relied upon by the state court independently and adequately support its judgment. Wolfe v. North Carolina, 364 U.S. 177, 186, 80 S.Ct. 1482, 1487 (1960).

The test as to the adequate support of the state judgment is the legitimacy of the procedural basis advanced by state court to justify its refusal to decide an explicitly argued federal question. 16 Wright and Miller, Federal Practice and Procedure, Jurisdiction, at 700. See Rogers v. Alabama, 192 U.S. 226,

24 S.Ct. 257 (1904). State procedural rule was not an adequate and independent state ground, and it was feared that state court sought to evade federal rights.

Federal standards should require the state court to recognize standing if a party (denied standing below) has asserted a right that state courts are obliged to protect. Wright and Miller, supra at 714. See Cramp v. Board of Public Instruction, 368 U.S. 278, 282, 82 S.Ct. 275, 278 (1961). The fact that state court denied standing does not preclude Supreme Court review of standing on federal grounds. See also, Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526, 79 S.Ct. 437, 440 (1959), wherein the Court focused on the duty of state courts to afford a remedy for federal rights. Federal jurisdiction must always

exist to define the scope of state court obligations in this area. Wright and Miller, supra, at 716.

In deciding the obligation of state courts to enforce federal rights, the Court will inquire as to available alternative state and federal remedies for vindicating that right. See Brinkerhoff-Farris Trust & Sav. Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451 (1930). State may not deprive a person of all existing remedies for enforcement of a right, which the State has no power to destroy, unless there is or was afforded to him some real opportunity to protect it. 281 U.S. at 682, 50 S.Ct. at 454-55. In Brinkerhoff, the Court found that failure to grant an opportunity to be heard was a denial of due process. 281 U.S. at 678, 50 S.Ct. at 453. See also, Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167 (1955).

Adequate assistance of counsel is a Constitutional requirement of Due Process which no State may disregard.

These cases suggest that the Court will ask the following questions in deciding whether to review the instant case:

1) Does Colorado have a legitimate state interest in denying standing to P.F., brother of T.A.F., and/or S.F. and B.F. and/or the extended family.

2) What, if any, are the alternative means by which P.F. and/or S.F. and B.F. and/or the extended family may raise their federal claims?

As to (1), it seems fair to say that the state will argue its interest in the finality of judgments, especially where, as here, the family may have had an opportunity below to object to and appeal the 1975 termination order. Certainly P.F., by virtue of the sham GAL and being

a child, should not be held to the same standard as S.F. and B.F. and other adult relatives.

Nevertheless, "waiver by conduct" and "procedural forfeiture" are both federal questions. See Henry, supra. See also Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 1241-42 (1977). Moreover, under Brinkerhoff, supra, it might be argued that even B.F. and S.F. were never afforded a "real opportunity" to advance their federal claims. (i.e., lack of notice; lack of adequate representation).

"Waiver by conduct" is a federal question when federal constitutional rights are involved. See, e.g., Brewer, supra; Garrity v. New Jersey, 385 U.S. 493, 498, 87 S.Ct. 616, 619 (1967). Waiver of constitutional rights must be measured by federal principles.

As to (2), the availability of

alternative means for raising their claims--the Court of Appeals declined to review the issue, but it was apparently hinting that such alternatives are available. Two possibilities which come to mind are: S.F. and B.F. filing an independent adoption proceeding, in which case the state court is likely to consolidate with the pending adoption; and petitioning the state court for a new hearing, pursuant to CRS 1973, § 19-3-116. Parent, guardian, custodian, next friend, or any person affected by a decree in a deposition or adjudication may petition the court for new hearing on grounds specified in Colorado Rules of Civil Procedure (CRCP) 59. The timing requirements of Rule 59 are rather strict, and the court's equitable powers thereunder are not as broad as under Rule 60.

Inevitably, the entire discussion is

going to revolve around an important question. Whose rights did B.F. and S.F. assert? The majority opinion in the Court of Appeals misconstrued the intent of the appeal. As the dissenting judge pointed out, S.F. and B.F. raised their federal claims on behalf of P.F., not necessarily on their own behalf. So even though, for argument's sake, B.F. and S.F. were not actual named parties in the 1975 proceeding, both T.A.F. and P.F. as children were parties. That is, even if the majority is correct in arguing that, under Rule 60(b) B.F. and S.F. were not "directly affected" by the 1975 termination order, P.F., as one of the minor children, was directly affected by that order. And the failure of the trial court to afford P.F., as well as T.A.F., adequate representation--especially where termination was a parental deposition--is

fundamental error under both state and federal caselaw. See Reece v. Georgia, supra, and People in Interest of M.B., 188 Colo. 370, 535 P.2d 192 (1975). Therefore, B.F. and S.F. should have been allowed to challenge the lack of adequate representation afforded to P.F. on his behalf. There does not appear to be any legitimate state interest in denying this claim on standing grounds, especially under relevant cases holding that the states have a duty to enforce federal rights. Moreover, there do not appear to be any other state remedies for vindicating P.F.'s claim concerning inadequate representation. Indeed, an adoption proceeding brought by B.F. and S.F. would not reach the question.

Certainly, the extended family visitation for three years and placement of P.F. with B.F. and S.F. after the 1975

termination order raise grave doubts as to the propriety of the trial court's restraint on relative placement. The majority opinion is also incorrect on the issue of whether B.F. and S.F. were "parties" to the termination order, since, under the majority's rationale, their rights were affected by the trial court's separate finding that it would not be in the best interests of the children to be placed with relatives. Even though B.F. and S.F. failed to appeal the termination order and its accompanying factual finding, the significance of their failure to do so is a federal question.

Two subsidiary questions arise from the majority opinion of the Colorado Court of Appeals. The majority opinion characterized the DSS motion on March 22, 1979, as a motion to join B.F. and S.F.

to "the dependency action." Although the Court of Appeals rejected the family's argument that they had standing as a result of this joinder, the court conceded that B.F. and S.F. could have "intervened at any stage of the dependency and neglect proceedings." This raises the question whether joinder in 1979 is itself a "stage" in the dependency action. If so, then even though they may not have been "parties" at the time of the termination order, they originally became parties as a result of joinder and should have been allowed to raise their claims. In addition, it seems clear that the basis for the 1979 injunction (and perhaps for the request for joinder) was the 1975 termination order which contained a finding concerning placement with relatives.

The majority's discussion of

CRCP60(b) draws rather extensively from federal caselaw interpreting FRCP60(b). Even assuming those federal cases to be controlling, it is clear that the Supreme Court has jurisdiction to review state court interpretation and application of federal law--especially where such interpretation is applied to preclude review of a federal claim.

By reopening the case and asserting jurisdiction over the Petitioners for the apparent limited purpose of entering a permanent injunction, the trial court conferred standing on the Petitioners as to all aspects of the proceeding.

In its Findings, Conclusions and Order, entered on August 16, 1979, the trial court held that only parties (emphasis added) have standing under Rule 60(b) of the Colorado Rules of

Civil Procedure. The trial court further held that Petitioners lacked standing because they were not parties prior to May 12, 1975.

On March 16, 1979, an injunction was requested by the DSS against the Petitioners. In order to assert jurisdiction to enter such an injunction, the trial court was required to join Petitioners as parties. See Rule 65(d), CRCP. An order to join Petitioners was entered on March 27, 1979. In its Findings, Conclusions, and Permanent Injunction entered on May 22, 1979, the trial court stated that it retained jurisdiction to enter such an injunction pursuant to C.R.S. 1973, 19-3-110. Therefore, the trial court's jurisdiction to enter such a permanent injunction was related back by the court to the proceedings that led to its termination order of May 12, 1975.

It has long been held that parties to an action always have standing to question the validity or existence of jurisdiction of a court under which an action is being brought and they may question that jurisdiction at any time during proceedings. Matson Nav. Co. v. United States, 284 U.S. 352 (1932). The jurisdiction of the trial court to grant an injunction relates back to and depends on the Petitioners, who may question the basis of the jurisdiction of the court to grant the injunction deriving from the Findings, Conclusions, and Disposition Order of May 12, 1975.

The United States Supreme Court has long recognized that the right to family relationships is part of the right to privacy which has been held to be one of the most jealously protected rights under the U.S. Constitution. See e.g. Griswold

v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923); Moore v. East Cleveland, 431 U.S. 494 (1977). Justice Goldberg, in his concurring opinion in Griswold stated:

> "The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family--a relation as old and as fundamental as our entire civilization--surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution."

The trial court's Order of May 12, 1975, as applied to the Petitioners through the Permanent Injunction issued on May 22, 1979, and signed on June 5, 1979, effectively severs all family rights between the extended family and T.A.F. Since these family rights are constitutionally recognized rights, they

may be severed only after compliance with the fundamental due process mandates of prior hearing, notice, and consent. None of these due process rights were accorded to the Petitioners or any other member of the extended family. Therefore, Petitioners' own Constitutional rights have been violated by the Order of May 12, 1975, as applied to them through the Temporary Injunction issued on April 6, 1979, and the Permanent Injunction issued on May 22, 1979.

Since their own Constitutional rights have been violated by the trial court's Order, Petitioners have been injured in fact by the Order and therefore have standing to challenge the Order under the doctrine of Ass'n of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150 (1970); and Wimberly v. Ettenberg, 570 P.2d 535 (Colo. 1977).

Furthermore, recent Colorado case law has accorded standing to relatives in the extended family. In C.B. v. People in the Interest of J.T.B., 30 Colo. App. 190, 490 P.2d 706 (1971), the Court held that a grandparent has status to appear and protest actions of the court relative to the child. Accord: In Re People in the Interest of C.P., 524 P.2d 316 (1974). Here the Petitioners also have status to appear on their behalf and on behalf of T.A.F., especially in view of the lack of procedural due process at the trial court level.

Rule 60(b) of the CRCP cannot be interpreted to contravene or interfere with a constitutionally protected right. Furthermore, the stated purpose of the Colorado Children's Code, C.R.S. 1973, 19-1-102(1) (a) and (b), is to preserve and strengthen family ties whenever

possible. In Re People in Interest of M.M., 184 Colo. 298, 520 P.2d 129 (1974).

The Order of May 12, 1975 has been used by the trial court and the DSS to hold that all family rights of the Petitioners to visit with T.A.F. have been severed, and to obviate consideration of them as adoptive parents for T.A.F. In order to effect such an abridgment of Petitioners' rights, the trial court should have joined Petitioners as parties to the litigation prior to the Order of May 12, 1975. The Petitioners must be considered as indispensable parties since their rights were being litigated. Rule 19, CRCP. Since indispensable parties were not joined, the proceedings that resulted in the trial court's orders, including the Order of May 12, 1975, itself, are void ab initio. Hidden Lake Dev. Co. v. District Court, 183 Colo.

168, 515 P.2d 635 (1973).

As a minor, T.A.F. is incompetent to assert his own Constitutional rights. T.A.F.'s Court-appointed GAL was appointed to protect the child's rights in critical stages of the proceedings which affected him. But in this case, the GAL took no steps beyond entering her signed appearance in November of 1972. Thereafter she neither appeared at nor participated in any of the proceedings. Consequently, the only persons able to assert and protect the Constitutional rights of T.A.F. are members of the extended family, and specifically the Petitioners. In order to have standing to assert the violation of a constitutional or statutory right, the asserting party must make two showings: 1) He must show an "injury in fact" to himself, and 2) He must be able to show a nexus

between the claimed violation and the injury that he suffered. Ass'n of Data Processing Service Organizations, Inc. v. Camp, supra; Wimberly v. Ettenberg, supra.

While normally the person whose rights were violated is the only one who may seek to enforce his rights, in some circumstances a claimant may assert the rights of third parties provided certain additional requirements are met. In Craig v. Boren, 429 U.S. 190 (1976), the United States Supreme Court stated that a claimant may assert the rights of a third party under the following circumstances:

a. the claimant himself has also suffered an "injury in fact" because of the action;

b. it is difficult or impossible for the third party to assert his own rights, and

c. there is a relationship between the claimant and the third party such that if the claimant chose to comply with the order of law, the effect would be to deny the third party his ability to assert his rights.

As to the first requirement, there is an "injury in fact" suffered by the Petitioners in the case for two reasons. First, the trial court Order of May 12, 1975, directly harmed the Petitioners because it foreclosed their right to seek custody of the child in question, although they were not accorded due process. Secondly, because of the temporary and permanent injunctions of May 22, 1979, the Order terminates their visitation with T.A.F. Where a claimant is subject to application of a court Order to a

court-ordered sanction, there is an injury in fact sufficient to satisfy the first standing set forth in Craig v. Boren, supra.

As to the second requirement, there is asserted herein a constitutional claim of inadequate representation of T.A.F. at all critical stages of the lower court proceeding, to wit: the Dispositional hearing held on March 20, 1975, all previous hearings which resulted in the final Order of May 12, 1975, and the subsequent May 22, 1979, permanent injunction hearing. There is a direct connection or nexus between this claim and the injury suffered by the Petitioners, which was the entry of the trial court's Order against their interests in and claims for visitation and custody.

As to the third requirement, it is clearly difficult or impossible for the

child to assert his own rights in this case because of his minority which makes him incompetent to litigate his own rights. He has an interest independent of the other parties at the Dispositional hearing. His interests should have been asserted by the Court-appointed GAL. But since the clearly inadequate representation by the GAL is an issue of paramount importance in this case, obviously T.A.F.'s interests must be asserted by other persons who also satisfy the other requirements enumerated in Craig v. Boren, supra. Since Petitioners are the only persons who could raise the issue for the child, the special relationship requirement is met.

STATEMENT OF THE CASE

This case is about a child who is now nine years old and the child's brother, maternal grandparents, aunts, uncles, godparents and other extended family members being prevented by the trial court from continuing to enjoy visitation with the child.

In January, 1973, at a hearing in which only the Department of Social Services (DSS) was represented by an attorney and neither parents nor children were represented by an attorney, and without appearance of the child, T.A.F., or his brother, P.F., they were adjudicated dependent and neglected and placed in the custody of the DSS.

On November 9, 1972, simultaneously with the DSS filing in the trial court of the dependency and neglect action in the interest of the children, T.A.F. and

P.F., the Pueblo District Court by its own order appointed a clerk of the Pueblo District Court to be guardian ad litem (GAL) for the children. The District Court clerk, GAL, filed a typewritten entry of appearance but did not appear or otherwise participate in any of the proceedings, which included termination of parental rights. The trial court in 1975 ordered termination of parental rights even though this was never requested in the pleadings nor was a separate petition filed to terminate parental rights.

Although the trial court's order of May 12, 1975, stated that the relatives of both T.A.F. and P.F. were not suitable for placement of either T.A.F. or P.F., after termination of parental rights the DSS authorized placement of P.F., brother to T.A.F., with B.F. & S.F.

those relatives closest to the child, T.A.F., even after they have been joined as parties, and to T.A.F.'s brother, P.F., were denied standing to raise the constitutional due process rights as to the trial court's jurisdiction. See People in the Interest of T.A.F. v. B.F., Colo. App. 624 P.2d 349, 351 (1980).

The trial court's appointment and permitting of the children's GAL to be a sham practically assured that the children would be denied their day in court.

As Colorado Court of Appeals Judge Berman points out in his dissent to the trial court's decision in People in the Interest of T.A.F. v. B.F., Colo. App. 624 P.2d 349, 353 (1980), even if the above issues were not raised, the Appellate Court has a duty under C.A.R. 1(d) to take notice:

> "Even had appellants not raised this issue in the trial court, we should take cognizance of it on appeal. For under C.A.R. 1(d) we have the 'right and duty to notice error on appeal ... where the error could be characterized as "fundamental" or where it is the cause of a "miscarriage of justice."'" Polster v. Griff's of America, 184 Colo. 418, 520 P.2d 745 (1974).

In a 1981 case, In re Marriage of Brown, 79CA0202, found at Page 1092 of The Colorado Lawyer for May, 1981, the Colorado Court of Appeals restates Judge Berman's position that even though grounds asserted on appeal were not raised in the trial court,

> "because the status of the minor children is at stake, we notice error in the trial court proceedings, and remand for findings." See C.A.R. 1(d); Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960); Lamborn v. Eshom, 132 Colo. 242, 287 P.2d 43 (1955).

It is important to point out that there is a federal significance in that the Colorado Appellate Rules are patterned directly on the Federal Rules of Appellate Procedure. Almarez v. Carpenter, 347 F.Supp. 597 (D.Colo. 1972).

As Judge Berman so eloquently pointed out regarding petitioners, the constitutional question makes all the difference:

> "Litigants cannot--by rules of procedure--be deprived of fundamental rights guaranteed by the constitution and laws of the United States ..." Lyons v. Mutual Benefit Health & Accident Ass'n, 305 U.S. 484, 83 L.Ed. 303, 59 S.Ct. 297 (1939)(emphasis added); Nor should litigants in state courts be denied these rights under the state constitution and its laws." See People in the Interest of T.A.F. v. B.F., Colo. App. 624 P.2d 349, 352-353 (1980).

ARGUMENT OF THE PETITIONERS

Children, as well as adults, have a fundamental, constitutionally-protected interest in the integrity of their family life, and their interest is legally and practically distinct from the interests of the other parties to a parental termination proceeding. Consequently, only the mandatory provision of separate counsel to children involved in such proceedings can assure that state intervention in family life is accomplished in a manner that is fundamentally fair.

The reasons for allowing the Writ are well stated in the Colorado Court of Appeals dissenting opinion of Judge Berman. See People in the Interest of T.A.F. v. B.F., Colo. App. 624 P.2d 349, 351-353 (1980). (Reproduced herein Exhibit A)

The Rule 60(b) motion (in both its

original and amended form) was filed by S.F. and B.F. on behalf of P.F., who is a minor and T.A.F.'s brother. This motion challenged the trial court's jurisdiction for its failure to assure that the guardian ad litem (GAL) would properly represent the interests of the minor children, as required by C.R.S. 1973 S19-3-105. The GAL was not an attorney (though it is conceded that at the time, a GAL was not required to be an attorney). Nonetheless, the GAL failed to appear at any stage of the dependency/neglect proceeding.

The trial court failed to appoint another GAL when it considered the motion for termination of parental rights in 1975. See People in the Interest of M.B., 188 Colo. 370, 535 P.2d 192 (1975)(Counsel for children required in all actions to terminate

parental rights; plain error to proceed to disposition--where termination is possible--in the absence of counsel for the child).

As members of the children's extended family, S.F. and B.F. have rights which are entitled to Constitutional protection. See Moore v. City of East Cleveland, 431 U.S. 494 (1977); Prince v. Massachusetts, 321 U.S. 158. As such, B.F. and S.F. are entitled to assert that the trial court failed to protect the rights of the children. Such failure divests the trial court of jurisdiction in this case. See People in the Interest of M.B., supra. Though B.F. and S.F. failed to appeal the termination order, this left the children without an advocate to assert their rights.

Parental rights, the rights of

visitation and the right to maintain family ties are "of the first order" and find protection in the Due Process and Equal Protection clauses of the 14th Amendment. See People in the Interest of C.S., 613 P.2d 1304 (Colo. 1980) (Quinn, J. dissenting). See also, Stanley v. Illinois, 405 U.S. 645 (1972); Overturf v. District Court, 602 P.2d 850, 851 (Colo. 1979); People in the Interest of T.H., D.H., et al, 593 P.2d 346 (Colo. 1979).

Children have the same fundamental rights. See People in the Interest of K.S. and M.S., 515 P.2d 130 Colo. App. (1973) (termination of parental rights severs permanently not only the rights of the parent relative to the child, but those of the child as well). See also, People in the Interest of C.S., supra, (Quinn, J. dissenting).

In the instant case, the GAL should have argued on behalf of the minor children, re: extended family ties. The denial of effective assistance of counsel cannot be attributable to either the children or the family. See People in the Interest of V.A.E.Y.H.D., 605 P.2d 916 (Colo. 1980).

Litigants cannot be deprived of fundamental rights guaranteed by the Constitution or federal laws via rules of procedure. See Lyon v. Mutual Benefit Health & Accident Ass'n, 305 U.S. 484 (1939). Similarly for rights guaranteed under state laws and state constitutions.

"The effect of the trial court's order preventing appellants from visiting with or contacting T.A.F. is to deny the child the blood relationship which he has with some

members of his extended family and even to deny him the companionship of his brother."

Judge Berman's dissent is well supported by current constitutional doctrine as follows. Recent developments in constitutional due process in the right to counsel for parents in child neglect cases are well presented in the following law review article. Driver, Barbara A., Constitutional Law - Due Process - Indigent Parent's Right to Counsel in Child Neglect Cases. Tennessee Law Review, Vol. 46, P. 649-670 (1979). See Smith v. Edmiston, 431 F.Supp. 941 (W.D. Tenn. 1977).

Recent developments in the constitutional due process right to counsel for children in proceedings to terminate parental rights are well presented in the Amicus Curiae Brief (Reproduced herein as Exhibit G, Appendix p.58a)

consisting of 39 pages, submitted in the Supreme Court of the United States, October Term 1979, No. 79-5932, in the case of John Doe and Jane Roe v. State of Delaware, on Appeal from the Supreme Court of Delaware, by Mary H. Sandoval, George Kannar, Marcia Robinson Lawry, Bruce J. Ennis c/o The Children's Rights Project, American Civil Liberties Union, 132 West 43rd Street, New York, New York 10036, Attorneys for Amicus Curiae.

Fundamental fairness requires the appointment of separate counsel to represent children in proceedings which may result in termination of their rights to family integrity.

It is precisely in recognition of such considerations that a study by the Institute of Judicial Administration/ American Bar Association Joint Commission on Juvenile Justice Standards,

Standards Relating to Abuse and Neglect, has proposed:

> "Appointment of counsel for child. Upon filing, the court should be required to appoint counsel at public expense to represent the child identified in the petition, as a party to the proceedings ..."

and why the official commentary on that provision explains:

> "There are good reasons to believe that this guarantee is constitutionally mandated in light of the significant consequences to the child if court wardship were ultimately imposed ... The reasoning underlying the Supreme Court's mandate of counsel for minors in In re Gault, 387 U.S. 1 (1967) thus applies readily to proceedings.

The argument is even stronger in the instant case because once the court appoints a GAL then the fundamental fairness of due process demands that the GAL participate in the termination proceedings as the Colorado Supreme

Court has held in People in the Interest of M.B., 188 Colo. 370, 535 P.2d 192 (1975).

In any proceeding in which termination of parent-child is sought, for the court not to provide representation by GAL or legal counsel for children violates the due process clause of the U.S. Constitution. See Sims v. State Department of Public Welfare, 430 F.Supp. 1179 (1977). See also, Sisk v. Duck, 593 S.W.2d 416 (Texas 1979); In re T.M.H., 613 P.2d 468 (Oklahoma 1980).

The U.S. District Court, S.D. Texas, Houston Division, quoted Powell v. Alabama, 287 U.S. 45, 68-69 (1932) "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

In Sims, the U.S. District Court, S.D. Texas, stated: "In a suit for involuntary termination of parental rights, the child's interest is generally distinct from that of either State or the parents."

In Smith v. Organization of Foster Families, 431 U.S. 816 (1976), the Supreme Court noted that there can be no doubt that these "liberty interests", to whatever extent they exist, belong to foster parents and foster children alike. The court also argued that the usual understanding of "family" implies biological relationships which provide the source for. e.g. the rights of the natural parent to conceive and to raise one's children. Stanley v. Illinois, 405 U.S. 645, 651 (1972) and the right to custody, care, and nurture of the child, Prince v. Massachusetts,

321 U.S. 150, 166. But the scope of these rights extends beyond the natural parent. Smith, supra, 431 U.S. 816, 843 n.19. See, Prince v. Massachusetts, supra, ("parent" therein was child's aunt); Moore v. City of East Cleveland, 431 U.S. 494, 504-511 (Brennan, J. concurring). The Court went on to acknowledge that

> "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachment that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children." Smith, 431 U.S. at 844.

The court went on to distinguish between foster families and natural families (e.g. relationships of natural families has origins apart from the power of the state, whereas the foster family exists by virtue of state law

and contractual arrangements. Thus, liberty interests of foster parents carry less weight when balanced against liberty interests of natural parents.) Id. at 845. The liberty interests of a foster parent who is also a blood relative should be stronger than those of an unrelated foster parent. Given language in Moore v. City of East Cleveland, 431 U.S. 494 (1977), this argument would be entitled to a great deal of weight.

Appellant Moore lived in East Cleveland, Ohio with a sons and two grandsons (who were first cousins). A local housing ordinance limited occupancy of a dwelling unit to members of a single "family". Appellant's household did not qualify as a family because the two grandsons were first cousins rather than brothers. Mrs. Moore was convicted

of violating the ordinance after she refused to change her household. The conviction was upheld in the state courts. The Supreme Court reversed, Mr. Justice Powell writing for the majority.

Powell declared at the outset that when the government intrudes on choices concerning family living arrangements, the court will carefully examine the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. 431 U.S. 494, 499. Citing, Stanley v. Illinois, 405 U.S. 645 (1972) (right of parents to custody and companionship of their children), Wisconsin v. Yoder, 406 U.S. 205 (1972) (Constitutional right of parents to assume primary role in decisions re: child rearing) and Ginsburg v. New York, 390 U.S. 629 (1968)

(parental rights in child rearing are basic to the structure of our society). Mr. Justice Powell said:

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we circulate and pass down many of our most cherished values, moral and cultural ..." Id. at 503-504.
>
> "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and ... grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored

> throughout our history, that supports a larger conception of the family." Id. at 504 505.

Especially in times of adversity, such as the death of a spouse or economic need, the family--in its broad sense--has tended to come together for mutual sustenance and to maintain or rebuild a secure home life for all members who are affected by the adversity. Id. at 505. This seems equally true in the instant case, where the "adversity" has come about because of the intervention of the State in parental and family matters.

Justices Brennan and Marshall, concurring with Justice Powell, recognized that application of the zoning ordinance would sever and disrupt the "sibling-type relationship" between the two grandsons. Id. at 506 n.2.

The entire concurring opinion highlights the "cultural myopia" of the abitrary boundary drawn by the zoning ordinance in light of the tradition of the extended family. Id. at 507-13. Some particularly interesting selections from this opinion follow.

Acknowledging that the "nuclear family" is the pattern of much of white suburbia, id. at 5098. (Citing J. Vander Zander, Sociology: A Systematic Approach, 322 (3d ed. 1975), Brennan and Marshall argued:

> "The Constitution cannot be interpreted ... to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship ... remains not merely still a pervasive living pattern, a prominent pattern ... for large numbers

> of the poor and deprived minorities of our society." Id. at 508.

Indeed, extended families have strengths not shared by nuclear families; moreover, extended families provide certain services and emotional support not always found in nuclear families. Id. at 509, n.7. The concurring justices concluded that the City of East Cleveland, via its ordinance, "has chosen a device that deeply intrudes into family associational rights that historically have been central, and today remain central, to a large proportion of our population. Id. at 510 (emphasis added). The choice of the extended family pattern is within the "freedom of personal choice in matters of ... family life (that) is one of the liberties protected by the Due Process Clause

of the Fourteenth Amendment." Id. at 511. (Citing, Cleveland Board of Education v. LaFluer, 414 U.S. 632, 639-40 (1974).)

The GAL appointed to represent the interest of T.A.F. was not present at any of the proceedings which concerned T.A.F. and the GAL filed no more than a signed form entry of appearance in November of 1972. It seems fair to conclude that the GAL appointment of Deputy District Court Clerk was intended only to colorably comply with the Colorado Children's Code. Petitioners argue that such an obvious and intentional circumvention of the underlying purpose to be served by the enactment of a GAL provision in the Colorado Children's Code, so taints these proceedings as to make invalid judicial action permanently affecting

the interests of this child.

The discussion on GAL contained in Ciccolella and Edinburg, A Study of Colorado Law and Procedure in Dependency and Neglect Proceedings, (1st Ed. 1979), beginning at Page 24 is instructive:

> "The recognition of the dependent and neglected child as a person entitled to the fullest of representation is embodied in the Colorado Legislature's Amendments to the Children's Code in 1967, to allow for the appointment of a GAL to protect the interest of a child in a dependency and neglect proceeding. See C.R.S. 1963 S 22-3-5 (1967, Permanent Cumulative Supplement). With the enactment in 1975 of the Child Protection Act the legal protection of the maltreated child has come to maturity and the powers of the GAL have become the single most effective tool for the protection of children."
>
> "It is generally accepted, that a child, and obviously infants in particular, cannot seek out their own advocates to protect them in actions in which they are involved. They

are, because of their infancy, incapable of pursuing grievances or protecting their rights." Page 25.

"The GAL is charged by the Statute in general with representation of the child's interest and to the end the law provides that he shall make such further investigations as he deems necessary, interview witnesses, examine witnesses, cross-examine witnesses introduce evidence in Court, make recommendations to the Court, and participate further in the legal proceedings to the degree necessary to adequately represent the child. C.R.S. S19-10-113(3) (1973, as amended).

"There is no person involved in any litigation, no matter what its nature or its foundation in law who has more power than the GAL in a child abuse situation to protect the interest and rights of that child. The GAL can be, if he wants, in fact, "a little Grand Jury" with the power supported by the Rules of Evidence and the Rules of Civil Procedure, to permit him to take the deposition of prospective trial

> witnesses, conduct all the investigations he deems necessary to protect his charge's rights, receive all of the reports necessary and do everything to represent that child short of actually filing criminal charges against the responsible party. That latter power being reserved for the Grand Jury or the District Attorney." Page 26.

The contrast between the duties contemplated for a GAL and the facts of this case are striking indeed. The only action ever taken by this GAL was to sign a form "Answer Entry of Appearance." Such non-representation after the assumption of duty is so serious a defect as to taint all of the proceedings.

For example, placement of T.A.F. with relatives was not seriously considered at the Dispositional Hearing. Respondents-Appellants assert that this would not have been the case

had an active GAL been present to assert the interests of the child. An active GAL would have been familiar with People in Interest of C.P., 524 P.2d 316 (Colo. App. 1974), and People in Interest of M.C.D.W., 522 P.2d 1234 (Colo. App. 1974), where this court holds that the Children's Code expressly contemplates the active participation of interested third parties. The outcome of this case could have been altered by adequate GAL representation of T.A.F. See also, People in Interest of C.P. v. F.P., 34 Colo. App. 54, 524 P.2d 316 (1974) where a relative was allowed to intervene at a Dispositional Hearing.

While there appears to be little Colorado authority on minimal standards of conduct for GALs, it seems obvious that such an appointment carries with it

the duty to do something. A GAL is the agent of the court and must protect the interests of the minor. Miller v. Clark, 144 Colo. 431, 356 P.2d 965 (1960); C.R.S. 1963, 22-3-5 (1967 Perm. Cumm. Suppl). A GAL is expected to act as an advocate on behalf of the child. People in Interest of C.K.G. v. C.D.G., 505 P.2d 979 (Colo. App. 1972).

Where, as here, there was no action by the GAL, let alone appearance at the dispositional hearing, the inadequate representation should be held to fail to fulfill fundamental due process requirements.

The Juvenile Division of a District Court has original jurisdiction in dependency and neglect proceedings, C.R.S. 1973, 19-1-104. Petitioners did not contest the lower courts jurisdiction as to the Petition in

Dependency or Neglect filed on November 9, 1972. However, petitioners argue that the petition did not provide the court with jurisdiction to terminate parental rights because such a remedy was not prayed for in the petition. Although the statutory provision requiring the recitation of a termination warning was not enacted until 1977 (Colo. Session Laws, 1977, Chapter 248 S8, P. 1030); a claim for relief must contain a statement as to what the petitioner claims to be entitled. The prayer or demand is a necessary part of a claim for relief. See Rule 8(a) Colorado Rules of Civil Procedure; Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1958). Here, of course, the requirements for a Petition in Dependency and Neglect are statutory; however, the Rules of Civil

Procedure are pursuasive as to the minimal requirements of pleading. Under the old Code, under the new Rules of Civil Procedure and under a special statutory procedure, pleadings must inform the parties of the nature of the claims and what remedies are sought. Soden v. Murphy, 42 Colo. 352, 94 P. 353 (1908); Myers v. Hayden, 82 Colo. 98, 257 P. 351 (1927); Employers Mutual Ins. Co. v. Board of Comr's of Pitkin County, 102 Colo. 177, 79 P.2d 380 (1938); De Cicco v. Trinidad Area Health Ass'n., 537 P.2d 559 (Colo. App. 1977).

In closing, the Petitioners should be allowed standing to challenge the jurisdiction of trial courts orders based on their legally protected rights under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, this Court should vacate the judgment of the court below and remand this case for further proceedings in which the children are represented by separate counsel and/or an effective Guardian ad Litem.

Respectfully submitted,

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APPENDICES

APPENDIX A

COLORADO COURT OF APPEALS

No. 79CA0997

The People of the State of Colorado,
In the Interest of T.A.F., a Child,
Petitioner-Appellee,

v.

B.F. and S.F.,
Respondent-Appellants,
J.L., J.E.L., E.M., P.M., J.M., and M.M.,
Respondents,

and Concerning,

P.G.F., M.F., J.B., and D.B.,
Other Interested Parties.

August 28, 1980
Division I
Kirshbaum, Van Cise, and Berman, JJ.

Appeal from the District Court of the County of Pueblo, Hon. Richard D. Robb, Judge, Judgment and order affirmed.

Stephen A. Reed, Assistant County Attorney, Pueblo, Colorado, for petitioner-appellee.

John S. Nicholls, David P. Holmes, Denver, Colorado, and Charles E. Butler, Pueblo, Colorado, for respondents-appellants, respondents and other interested parties.

Opinion by JUDGE KIRSHBAUM.

In 1975, the trial court entered a judgment terminating the parental rights of P.G.F. and M.F. in their child, T.A.F. In 1979, S.F., the child's maternal aunt, B.F., S.F.'s spouse and the other respondents, maternal aunts and uncles of the child who constitute a portion of the child's extended family, were made parties to the action and were enjoined from visiting the child. S.F. and B.F. appeal the trail court's permanent injunction and the trial court's denial of their request for relief from the 1975 judgment. We affirm.

In November of 1972, a petition in dependency and neglect was filed by the People for the benefit of T.A.F. and his two older brothers. The day after the petition was filed a court employee was appointed guardian ad litem for the

three children. However, the guardian ad litem did not appear at any subsequent proceeding.

In January 1973, the children were declared dependent and neglected. A dispositional hearing commenced in January 1974, and S.F. testified as a witness for the parents during the hearing. In May 1975, the trial court terminated the parental rights of P.G.F. and M.F. and placed the three children in the custody of the Pueblo County Department of Social Services (the Department). The court's termination order included a finding that placement with relatives would not be in the best interests of the children. It was not appealed.

On March 17, 1978, the trial court entered an order retiring the case from the court's docket.

From July 5, 1973, to November 13, 1978, the child resided in a foster home in Pueblo, Colorado. During that time he was visited by the respondents and by his brother. In November of 1978, T.A.F. was placed for adoption with J.B. and D.B., who reside in Florence, Colorado, outside of Pueblo County.

On March 22, 1979, the People filed a motion to join B.F., S.F. and the other respondents to the dependency action and also filed a motion for temporary and permanent injunctive relief against all named respondents. On March 27, 1979, the motion to join respondents was granted.

On March 22, 1979, B.F. and S.F., individually and, allegedly, "on behalf of and as members of a class, The Extended Family of the child," filed a motion pursuant to C.R.C.P. 60(b)

denominated a "motion for appropriate orders." On May 24, 1979, they filed an amended motion for appropriate orders requesting the trial court to set aside and relieve them from the May 12, 1975, termination order. It did not incorporate the class status allegations of the first motion.

On June 5, 1979, the trial court entered a permanent injunction restraining the respondents from any and all contact with T.A.F. "until the adoption . . . becomes final." On August 16, 1979, the trial court denied the C.R.C.P. 60(b) motion of S.F. and B.F. The notice of appeal in this case was filed only by S.F. and B.F.

B.F. and S.F. contend that the trial court had no jurisdiction to grant injunctive relief against respondents because the case had been retired from

the court's docket prior to the filing of the People's motions. We disagree.

This argument challenges the lower court's jurisdiction and, therefore, may be considered on appeal even though not presented to the trial court. Peaker v. Southeastern Colorado Water Conservancy District, 174 Colo. 210, 483 P.2d 232 (1971). The trial court retains jurisdiction over all juvenile cases until the child is emancipated. Section 19-3-118, C.R.S. 1973. The March 1978 order removed this case from the docket of cases maintained by the trial court; it did not, however, affect that court's continuing statutory jurisdiction over T.A.F.

S.F. and B.F. also assert that the May 12, 1975 termination order is void because (1) T.A.F.'s guardian ad litem did not exercise any authority on behalf

of the child, thus depriving him of constitutional rights of representation; and (2) the 1972 petition for dependency and neglect filed by the People did not confer jurisdiction upon the trial court to terminate the parental rights of the child's natural parents. They contend they have standing to challenge the validity of the 1975 termination order pursuant to C.R.C.P. 60(b) because in 1979 they were joined as respondents to the proceedings at the People's request. We conclude that S.F. and B.F. are not "parties" as contemplated by C.R.C.P. 60(b). We therefore address neither the merits of their constitutional arguments nor the possibility that other means for resolution of such issues might be available.

C.R.C.P. 60(b), insofar as is pertinent here, states as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons . . . (3) the judgment is void . . .

The rule, patterned upon its federal counterpart, permits one who is the object of a judicial order to challenge the validity of such order subsequent to its entry. See Farmers Elevator Co. v. First National Bank, 181 Colo. 231, 508 P.2d 1261 (1973); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974). The rule permits the trial court to correct errors and to prevent injustice for numerous reasons; in most instances the party seeking relief must present evidence to justify

the request for relief, thus invoking the fact-finding authority of the trial court. See Rowe v. Watered Down Farms, 195 Colo, 152, 576 P.2d 172 (1978).

The 1975 order terminated the parental rights of the child's natural parents. Contrary to their assertions, S.F. and B.F. did not suffer a loss of legal rights as a result of that order. Although as relatives, they could have intervened at any stage of the dependency and neglect proceedings, People in the Interest of M.C.D.M., 34 Colo. App. 91, 522 P.2d 1234 (1974), they did not do so, and thus, were not parties at the time the termination was entered.

Isolated federal cases extending standing under federal Rule 60(b) to persons not named as a party at the time of the challenged judgment are limited to contexts wherein the person

seeking relief was directly affected by the challenged judgment or was in privity with a party who was the object of the judgment. See e.g., Mayberry v. Maroney, 529 F.2d 332 (3rd Cir. 1976); Wright v. County School Board, 309 F.Supp. 671 (E.D. Va. 1970). In 1975, S.F. and B.F. were not in privity with the child's natural parents with respect to the parents' parental rights; moreover, the legal interests of B.F. and S.F. were restricted by the 1979 restraining order, not the 1975 termination order. Hence, we conclude that S.F. and B.F. have no standing here to challenge the 1975 judgment under C.R.C.P. 60(b). Se In Re Four Seasons Security Laws Litigation, 525 F.2d 500 (10th Cir. 1975); Ratner v. Bakery & Confectionary Workers International Union, 394 F.2d 780 (D.C. App. 1968); United States v. 140.80 Acres

of Land, 32 F.R.D. 11 (E.D. La. 1963).

Judgment affirmed.

Judge Van Cise concurs.

Judge Berman dissents.

JUDGE BERMAN DISSENTING.

I dissent.

I disagree with the majority's holding that B.F. and his wife, S.F., are persons whose legal interests are not directly affected by the challenged judgment and have no standing to challenge this judgment. First, it is important to note an essential omission in the facts as stated by the majority. The May 22, 1979, motion filed by B.F. and S.F. requested appropriate orders and stated that it was filed "individually and on behalf of and as member of a class, The Extended Family of T.A.F., and as next friend of P.F., a minor and brother of T.A.F.," (emphasis added). The record

further reveals that P.F. is in the custody of B.F. and S.F. The May 24, 1979, amended motion for appropriate orders, while eliminating the class status allegation of the first motion, did reiterate it was filed also on behalf of the brother, P.F.

Until the May 22nd motion, B.F. and his wife had never appeared before the court as interested parties, but they were thereafter joined in the action at the request of The People, at the trial court's suggestion. The motion challenged the jurisdiction of the trial court for its failure to assure the guardian ad litem's proper representation of the three minor children as required by §19-3-105, C.R.S. 1973. The guardian ad litem, who was appointed by the then trial judge was a deputy clerk of the district court and not an attorney.

Further, as the record shows, the guardian ad litem did not appear at any stage of the dependency and neglect proceeding nor did the court, when it considered the motion for termination of parental rights of the parents of T.A.F., P.F., and M.F. some three years later, appoint another guardian ad litem for the children.

B.F. and his wife, as members of the children's extended family, had protected rights under the Constitution. Moore v. East Cleveland, 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977), and could bring to the attention of the trial court the failure of the court to protect the rights of the children. Such a failure I perceive to be one which denies the court jurisdiction to proceed on the dependency petition and the termination of the parental rights. "Where the

object of the amended petition was to terminate parental rights, it was plain error to proceed to the dispositional hearing in the absence of counsel for the children." People in the Interest of M.B., 188 Colo. 370, 535 P.2d 192 (1975).

True, the parents did not appeal, but that fact left the children without anyone to assert their rights. It is equally true that the statute in effect providing for the appointment of a guardian ad litem did not require that the guardian ad litem be an attorney until it was amended in 1977. Colo. Sess. Laws 1977, ch. 248 § 19-11-103(3) at 1027. Nevertheless, attorney or not, her duty was to protect the interests of the children, and this she did not do.

The rights severed in this case are of the first order and find protection

in both the due process and equal protection clauses of the Fourteenth Amendment, People in the Interest of C.S., ____ Colo. ____, ____P.2d ____ (annc'd July 7, 1980)(J. Quinn dissenting). See also Overturf v. District Court, ____ Colo. ____, 602 P.2d 850 (1974). And a child has the same fundamental rights. See People in the Interest of K.S. and M.S., 33 Colo. App. 72, 515 P.2d 130 (1973).

In 1972 when the guardian ad litem here was appointed, the General Assembly had effective April 21, 1972, enacted §22-8-10, 1973 C.R.S. See Colo. Sess. Laws 1972, ch. 36, at 154, especially § 22-10-8(3). The duties of a guardian ad litem are clearly outlined in mandatory form. And, the court has the obligation to ensure that these duties which devolve upon the guardian ad litem

are in fact undertaken by the gaurdian ad litem. The failure of the court to so act was error so plain as to vitiate not only the order of dependency, but, most certainly, the termination of parental rights. I see no distinction between the duties of a guardian ad litem under § 22-10-8, C.R.S. 1973, and those which a guardian ad litem should be required to perform under § 19-3-105, 1973 C.R.S., for under either section, a petition in dependency results.

Here, the guardian ad litem did nothing except file an appearance on a printed form which form merely requested that the court require strict proof of the allegations made in this petition in dependency. It is beyond my comprehension to believe that this pro forma act constitutes adequate representation of the children the guardian

ad litem was appointed to protect. Nor would adequate representation by the guardian have ignored the background of the children which was "racially and culturally of Mexican American blood . . . who have participated in an extended family which includes Indian ancestors." And, here, the denial of effective assistance of counsel cannot be attributed to the children nor the appellants. People in the Interest of V.A.E.Y.H.D., ____ Colo. ____, ____ P.2d ____ (1980).

"Litigants cannot . . . --by rules of procedure--be deprived of fundamental rights guaranteed by the Constitution and laws of the United States . . . Lyon v. Mutual Benefit Health & Accident Ass'n, 305 U.S. 484, 83 L.Ed. 303, 59 S.Ct. 297 (1939)(emphasis added); nor should litigants in state courts be

denied these rights under the State Constitution and its laws.

Even had appellants not raised this issue in the trial court, we should take cognizance of it on appeal. For under C.A.R. 1(d) we have the "right and duty to notice error on appeal . . . where the error could be characterized as 'fundamental' or where it is the cause of a 'miscarriage of justice.'" Polster v. Griff's of America, 184 Colo. 418, 520 P.2d 745 (1974).

The effect of the trial court's order preventing appellants from visiting with or contacting T.A.F. is to deny the child the blood relationship which he has with some members of his extended family and even to deny him the companionship of his brothers. I cannot in good conscience approve the procedure below, nor should this court.

APPENDIX B

IN THE DISTRICT COURT IN AND FOR

THE COUNTY OF PUEBLO AND

STATE OF COLORADO

NO. J-4079 DIV. E

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of
T.A.F., a Child,

And Concerning,

P.G.F., M.F., B.F., S.F., J.L.,
J.L., E.M., P.M., J.B., D.B., J.M.
and M.M.,
Respondents.

FINDINGS, CONCLUSIONS AND ORDER

August 16, 1979

THIS MATTER came on for hearing to the Court on July 20, 1979, on a Motion for Appropriate Orders and an Amended Motion for Appropriate Orders filed by the Respondents, B. F. and S. F. The Pueblo County Department of Social Services was represented by Steven A. Reed, Assistant County Attorney. The Respondents, B. F. and S. F. were present in person and represented by Charles E. Butler.

The Court heard the arguments of counsel and thereafter ordered that written briefs be submitted upon the limited issue as to whether or not the Respondents, B. F. and S. F. had standing pursuant to Rule 60 (b) of the Colorado Rules of Civil Procedure to challenge an order of this Court dated May 12, 1975, which terminated the parental rights of P. G. F. and M. F. to the child

T. A. F. In accordance with this Court's order the Respondents filed their brief with the Court on August 7, 1979, and the Pueblo County Department of Social Services filed its brief with the Court on August 13, 1979.

The Court has now reviewed the briefs submitted by the parties and its entire file herein and is now fully advised in the premises.

THE COURT FINDS AND CONCLUDES:

Respondents, B. F. and S. F. were not parties to this litigation at the time the Court issued its order terminating the parental rights of P. G. F. and M. F. to T. A. F. on May 12, 1975. Respondents, B. F. and S. F. by their own admission, were aware of the termination proceedings, however, they made no attempt to intervene or to inform the Court that

they were interested in obtaining custody of any of the children and particularly T. E. Because the Respondents, B. E. and S. F. were not parties to this action prior to May 12, 1975, they lack standing, under Rule 60(b) of the Colorado Rules of Civil Procedure to move this Court to set aside this Court's order terminating the parental rights of B G. E. and M. E. to T A. F. issued May 12, 1975.

The Motion for Appropriate Orders and Amended Motion for Appropriate Orders filed by the Respondents, B. E. and S. F. should be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

The Motion for Appropriate Orders and Amended Motion for Appropriate

Orders filed by the Respondents, B F and S F are denied.

Done by the Court this 16 day of August, 1979.

BY THE COURT:

(signed) Richard D. Robb
RICHARD D. ROBB, District Judge

xc: Steven A. Reed

Charles E. Butler

H.F. Harward, 831 Royal Gorge Blvd., Canon City, CO 81212

Fremont County District Court, Canon City, CO 81212

Pueblo County Department of Social Services

(Copies mailed 8/16/79, jm)

APPENDIX C

IN THE DISTRICT COURT IN AND FOR

THE COUNTY OF PUEBLO AND

STATE OF COLORADO

NO. J-4079 DIV. E

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of
T.A.F., Child

And Concerning,

P.G.F., M.F., B.AND S.F., J. AND J. LOPEZ, E. AND P.M., J. AND D. B., J. AND M.M.

Respondents.

ORDER

July 20, 1979

The above-entitled matter came before the Court on July 20, 1979 upon the Motion for Appropriate Orders, the Amended Motion for Appropriate Orders and the Motion for Psychiatric Examination filed by the Respondents, B. F. and S. F. Charles E. Butler appeared on behalf of said Respondents and Stephen A. Reed, Assistant County Attorney, represented the Pueblo County Department of Social Services.

After making a statement in connection with the Motion for Appropriate Orders, and the Amended Motion for Appropriate Orders, Mr. Butler requested leave to file with the Court, within 15 days, a Memorandum demonstrating the standing of the Respondents, B. F. and S. F. to request vacation of the Termination Order entered herein on May 12, 1975, pursuant to Rule 60(b)

of the Colorado Rules of Civil Procedure. Mr. Reed requested 5 days within which to file a written response to Mr. Butler's Memorandum.

With regard to the Motion for Psychiatric Examination filed by the Respondents, B. F. and S. F., the Court after hearing testimony, statements of counsel and reviewing the file herein, finds as follows:

1. That on May 12, 1975, a Dispositional Order was rendered in the above-entitled matter with respect to the minor child, T. A. F. The aforesaid Order provided that the guardianship of the person and the legal custody of the minor child, T. A. F. was transferred to the Pueblo County Department of Social Services, with full power and authority to place the child for and

consent to his adoption.

2. On March 19, 1979, the People and the Pueblo County Department of Social Services filed with the Court a Motion to join as Respondents, B F. S, F. J. P. L. J. L. E, M., P. M, J. C. M, and M. M. a Motion for Temporary Restraining Order, supported by the Affidavits of Anne Schmuck and Sharon Hawkins, and a Motion for Permanent Restraining Order. On March 27, 1979, the Court ordered the aforesaid persons joined as respondents in the above-entitled action and promulgated a Temporary Restraining Order prohibiting said Respondents from visiting the child.

3. On April 16, 1979, Charles E. Butler entered his appearance on behalf of the Respondents, B. F. and

S F in connection with the aforesaid Motions. On April 18, 1979, a hearing was held on the Motion for Permanent Restraining Order and upon the Respondents' Motion to Quash or Dismiss. The matter was continued to May 11, 1979, and the Court ordered that J B and D B be joined as parties to the action. Further evidence was presented to the Court on May 11, 1979, and the proceedings were again continued to May 22, 1979.

4. On May 9, 1979, the Respondents' Motion for Psychiatric Examination and supporting Memorandum were filed with the Court, however, the Motion was not duly noticed in for hearing on May 22, 1979, and the Court declined to consider the Motion for Psychiatric Examination on May 22, 1979, as no notice to the Respondents, J B and D B

had been given.

5. On June 5, 1979, the Court issued its Findings, Conclusions and Permanent Injunction. Said Injunction restrained the Respondents, B. F. S. F., J. P. L., J. L., E. M., P. M., J. C. M., and M. M. from visiting the minor child at the home of the adoptive parents, J. B. and D. B. or elsewhere. On June 4, 1979 the Respondents, B. and S. F., filed a Motion for Additional Time, and on June 5, 1979, the Court granted said Motion and allowed the Respondents to July 5, 1979 to file a Motion for Re-Hearing and/or New Trial. No Motion for Re-Hearing or New Trial has been filed by the Respondents, pursuant to the Colorado Rules of Civil Procedure, and as a consequence, the Injunction dated

June 5, 1979, is final.

6. The Motion for Psychiatric Examination submitted by the Respondents, B. F. and S F relates that its pur pose is to procure evidence to oppose the Motion for Permanent Restraining Order filed by the Pueblo County Department of Social Services. No amended or supplemental motions have been filed by the Respondents and it appears from said Respondents' arguments before the Court this date that the purpose of the Motion for Psychiatric Examination remains to secure evidence in opposition to the Permanent Injunction promulgated by this Court on June 5, 1979, which has become a Final Order. It would, therefore, appear that said Respondents' Mo tion for Psychiatric Examination is moot.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the Motion for Psychiatric Examination be, and the same hereby is, denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Respondents, B. F. and S. F. shall have until 5:00 P.M. on August 6, 1979 to submit to this Court a written Memorandum in support of and limited to the issue of their standing under Rule 60(b) of the Colorado Rules of Civil Procedure to request vacation of the Termination Order promulgated herein on May 12, 1975, and for a re-hearing. The Pueblo County Department of Social Services shall have until 5:00 P.M. on August 13, 1979 to respond in writing to Respondents' Memorandum, after which the Court shall rule upon the Motion for Appropriate Orders and Amended Motion for Appropriate Orders

filed by the Respondents herein.

Done this 27 Day of July, A.D. 1979, nunc pro tunc July 20, A.D. 1979.

BY THE COURT:

(signed) Richard D. Robb
JUDGE

cc: Stephen A. Reed
Charles E. Butler
H. R. Harward, 831 Royal Gorge Blvd., Canon City, Colorado 81212
Pueblo County Department of Social Services, Anne Schmuck

APPENDIX D

IN THE DISTRICT COURT IN AND FOR

THE STATE OF COLORADO AND

COUNTY OF PUEBLO

NO. J-4079 DIV. E

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of
T.F.

And Concerning,

P.B.F., M.F., B. and S.F., J. and J. L., E. and P.M., J and D.B., J and M.M.

Respondents.

June 25, 1979

At this day, it is ordered by the Court, that the hearing on Respondents, B. and S. F.'s Motion for Appropriate Orders and for Psychiatric Examination, be scheduled for hearing on Friday, July 20, 1979 at 8:30 o'clock A.M.

Done by the Court this 25th day of June, A.D. 1979.

BY THE COURT:

(signed) Richard D. Robb
RICHARD D. ROBB,
DISTRICT JUDGE

xc: Steve Reed
Department of Social Services
Charles Butler
Ray Harward, Attorney at Law,
Canon City, Colorado

APPENDIX E

IN THE DISTRICT COURT IN AND FOR

THE COUNTY OF PUEBLO AND

STATE OF COLORADO

NO. J-4079 DIV. E

THE PEOPLE OF THE STATE OF COLORADO,
In the Interest of
T.A.F., a Child,

And Concerning,

B.F., S.F., J.P.L., J.L., E.M.,
P.M., J.C.M., M.M., J.B. and D.B.,

Respondents.

FINDINGS, CONCLUSIONS

AND PERMANENT INJUNCTION

June 5, 1979

The above-captioned matter came before the Court on April 18, 1979, May 11, 1979, and May 22, 1979, for hearing upon a Motion for Permanent Injunction filed by the People in the interest of T. A. F. , minor child. Stephen A. Reed, Assistant County Attorney, appeared on behalf of the People and Charles E. Butler appeared for the Respondents, S. and B. F. The remaining and above-named Respondents were present in the court room, but were not represented by counsel.

The Court has heard testimony and statements of counsel, received documentary evidence, reviewed its entire file herein, and has taken judicial notice of the contents of the files in Actions No. J-6186, Division "E", and J-9796, Division "F", in the Pueblo

County District Court. After considering all the evidence concerning this matter,

THE COURT FINDS AND CONCLUDES AS FOLLOWS:

B. F., S. E., J. P. L., J. L., E. M., P. M., J. C. M., and M. M. were joined as Respondents in the above-entitled action on March 27, 1979, were duly served with process in connection with the aforesaid Motion, appeared in Court and are personally subject to the jurisdiction of the Court.

The Court has jurisdiction of the subject matter with respect to the People's Motion for Permanent Injunction. On May 12, 1975, a Dispositional Order was promulgated herein whereby parental rights with respect to the child were terminated and guardianship of the person

and legal custody of the child were transferred to the Pueblo County Department of Social Services. Said Department was expressly authorized by the aforesaid Order to place the child for and consent to his adoption. On March 17, 1978, the Court entered an order, sua sponte, retiring the above-entitled matter from the Court's docket.

On January 10, 1979, the Honorable Max C. Wilson, Judge for the District Court of Fremont County, Colorado, issued an Interlocutory Judgment and Decree approving placement of the child with J. D. B. and D. J. B. for eventual adoption. No final order of adoption has yet been promulgated by the Fremont County District Court. Therefore, this Court's jurisdiction over the minor child, T. A. F. continues under Section 19-3-118 C.R.S. (1973).

This Court retains authority pursuant to Section 19-3-110 C.R.S. (1973), to promulgate an order of protection, in assistance of its prior Order of Disposition, as requested by the People on behalf of T. A. F.

The Respondent, S. F., testified at the Dispositional Hearing held on March 20, 1975 in the above-entitled matter, and the Court considered all alternatives to severance of the parent-child legal relationship. The Court found in its Order of May 12, 1975, at page "3", that "...Relative placement is not considered a viable alternative for placement of the children...nor does there appear to be any evidence to show that placement of the children with relatives would be in their best interests..."

The testimony indicates that T.

Ferris remained in foster placement with the Leroy Martinez family until he was placed with J. and D. B. for adoption in November, 1978. While living with the Martinez family, T. had contact with members of his family named as Respondents herein, and he did not appear to be adversely affected as a result of such contact. The testimony also indicates that the Martinez family and members of T.'s family enjoyed a friendly relationship during the period T. F. was in foster placement at the Martinez home.

In November, 1975, the Respondents, E. and P. M. filed a Petition to adopt T. F. in the Pueblo County District Court. That Petition was voluntarily withdrawn by the same Respondents in Civil Action Number J-6186, Division "E", on May 3, 1976.

A second Petition for Adoption of the child was filed in Civil Action Number J-9796, Division "F", in the Pueblo County District Court by the same Respondent, in November, 1978. A hearing was held upon the second Petition and an Order was promulgated by t he Honorable Donald E. Abram, District Court Judge, on December 28, 1978, denying the M.'s second Petition for Adoption of T. F. In support of that Order, the Court found that it would be in the child's best interests to be adopted by the Bells and that it would not be in the child's best interests to be adopted by the Respondents, P. and E. M.

No other Petitions for Adoption of the child have ever been filed by any of the Respondents, with the exception of the Bell Petition, pending in Fremont

County District Court.

The proceedings at hand were precipitated by a visit on or about January 17, 1979, to the residence of the child and his adoptive parents, J B. and D. B. by the Respondents, S. F. and J. L. who are related to the child as aunts. The two aunts did not request or receive prior permission from the Court, the Pueblo County Department of Social Services, or the B's to visit the child. Upon their entry into the adoptive home, the aunts indicated to Mrs. B. that they were also interested in adopting T. and requested Mrs. B. to withdraw her Petition in their favor. According to Mrs. B., T. appeared quiet and depressed following the visit. Both Mr. and Mrs. Bell testified that, although the visit was upsetting to them, they have no intention of abandoning

their attempt to adopt the child.

The testimony of Sharon Hawkins, who was duly qualified as an expert in the field of adoptions and of Nancy Aldrich, Ph.D., as an expert in child psychology, establishes that the child is presently in the process of forming an attachment to his adoptive parents and that visitation at this time or in the near future between the child and the Respondents, other than the B's would cause irreparable and severe emotional damage to the child, in addition to jeopardizing the child's present placement, which placement is essential to the child's best interests.

People In the Interest of M.D.C.M., A Child, and Concerning L.M. and J.M., Respondents, 522 P.2d 1234, 34 Colo. App. 91 (1974) prescribes that although the Juvenile Court is the final arbiter

in adoptive placements, its authority to initiate and implement such placements may be revocably delegated to an appropriate agency. Sections 19-4-108, 109 and 111 C.F.S. (1973), as amended, explicitly contemplate that the County Department of Social Services will assist the Juvenile Court in effecting adoptive placements. An adoptive placement of the child, pursuant to this Court's Dispositional Order of May 12, 1975, was made by the Pueblo County Department of Social Services with the B.s in November, 1978. That placement was approved by the Fremont County District Court, on January 10, 1979 as conducive to the best interests of the child. This Court notes from its own records that no one has petitioned the Court to review the exercise of the powers delegated to the Pueblo County Department of Social

Services in the aforementioned Dispositional Order.

The Court further concludes that the Children's Code contemplates that adoptive family ties should be protected from extraneous interference. White v. Davis, 163 Colo. 122, 428 P.2d 909 at p. 911, (Sup. ct, 1967).

As no final decree of adoption has been rendered by the Fremont County District Court, this Court retains jurisdiction pursuant to Section 19-3-110 C.R.S. (1973), as amended, to issue protective orders. The Fremont County District Court does not have such explicit jurisdiction under the Adoption Article of the Colorado Children's Code to promulgate an appropriate protective order in aid of the child's adoptive placement.

The Court finds that it would promote

the best interests of the child, T. A. F. to grant a Permanent Injunction herein until the adoption promulgated herein of T. F. by J. and D. B. becomes final.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the Respondents, B. F. S. F., J. P. L., J. L., E. M. P. M., J. C. M., and M. M. shall refrain from any and all contact with the minor child, T. A. F. and shall not attempt to visit said minor child at the home of his adoptive parents, J. B. and D. B. and further, that said Respondents shall not call, harass, annoy or make a nuisance of themselves in or around the aforewaid adoptive home.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this Permanent Injunction

shall remain in effect until the adoption of T F by J and D B becomes final.

Done nunc pro tunc this 5 day of June, A.D. 1979.

BY THE COURT:

(signed) Richard D. Robb
JUDGE

cc: Stephen A. Reed
Charles Butler
Family Social Services, Sharon Hawkins, 302 Jefferson, Pueblo, Colorado 81004
Pueblo County Department of Social Services, Anne Schmuck
J
J
E
J
M
J
D
P
H

APPENDIX F

IN THE DISTRICT COURT IN AND FOR

THE COUNTY OF PUEBLO AND

STATE OF COLORADO

NO. J-4079 DIV. E

THE PEOPLE OF THE STATE OF COLORADO
In the Interest of
M.F., P.G.F., JR., and T.A.F.,
Children,

And Concerning

P.G.F., and M.F.,
Respondents.

FINDINGS, CONCLUSION, AND
DISPOSITION

May 12, 1975

This matter came on for a Dispositional Hearing to the Court on March 20, 1975. William J. Ballas, Attorney at Law, represented The People of the State of Colorado at all previous hearings, as well as this Dispositional Hearing. James Ripperger, Attorney at Law, represented the respondent, M. F. at this hearing; Victor Moss, Attorney at Law, represented the respondent, P. G. F. at this hearing. Both respondents were present, and the children, M. F., P. G. F., Jr., and T. A. E. were present in the court room. The Court heard the testimony, received additional evidence, which included all Social Histories, dated from January 11, 1974 through March 14, 1975, all medical reports and psychological reports, as well as arguments of counsel. The Court then

took the matter under advisement. The Court has now reviewed all of the evidence concerning the matter, as well as its entire file herein, and is now sufficiently advised in the premises.

THE COURT FINDS AND CONCLUDES:

On November 9, 1972, pursuant to Court authorization, a Petition was filed against the respondents, P. G. F. and M. F. alleging that their natural children, M. F. P. G. F. Jr., and T. A. F. were dependent or neglected children. On December 27, 1972, a hearing was held upon the Petition in Dependency or Neglect, and by Adjudication Decree dated January 3, 1973, it was determined by the Court that the children, M. F. P. G. F. Jr., and T. A. F. were dependent and neglected children, and their custody was placed

with the Pueblo County Department of Public Welfare, now known as the Pueblo County Department of Social Services. In that determination, the Court found that the children, M. F. P. G. E. Jr., and T. A. F. were dependent and neglected children for the reasons that they lacked proper parental care through the actions or omissions of the parents; that their environment was injurious to their welfare; and that their parents failed or refused to provide proper or necessary substinance, education, medical care, or any other care necessary for their health, guidance or well being.

Thereafter, the respondent, M. F. retained Mr. James Ripperger, Attorney at Law, to represent her in this matter, and the respondent, P. G. F. retained Mr. Victor Moss,

Attorney at Law, to represent his interests, and the matter was set for Dispositional Hearing on January 11, 1974, and concluding on January 15,1974, and in that hearing the matter was continued for further Dispositional Orders on June 20, 1974. Further Dispositional Hearing was held on June 20, 1974, and due to the untimely death of the Honorable Harper Abbot, before Dispositional Order was entered, this matter was again set for Dispositional Hearing on this date, March 20, 1975.

The respondents, P. G. F. and M. F. have a history of emotional instability which has interfered with their ability to provide proper care for the children herein. This emotional instability on the part of both parents occurred both during their marriage and since their Dissolution of Marriage.

The respondent, Pete G. Ferris, has a long history of alcoholism which has interfered with his ability to care for the children. Numerous efforts and attempts have been made to help P G. F cope with his drinking problem, without noticeable improvement.

The respondent, M F has also resorted to drinking alcoholic beverages to cope with frustrations and is still attempting to control the problem which has continued to exist up to the time of the Dispositional Hearing.

A pattern of depression and anger by both respondents as a method of coping with frustrations is apparent and such behavior appears likely to continue into the future.

Both respondents have received help from numerous community resources to assist them in attempting to cope with

behavior described previously, but without noticeable success.

The behavior exhibited by respondents has had a noticeable effect on the two older children, M. F. and P. G. F., Jr., to the point where both children are in need of medical and psychological care. The youngest child, who has not been subjected to the same type of parental behavior, does not demonstrate the same inability to adjust that the older children demonstrate.

The Court, therefore, concludes that the actions of the respondents which caused the children to be dependent and neglected will in all probability continue into the future.

The children, M. F., P. G. F., Jr., and T. A. F. have intermittently been in foster home placement since March 21, 1972, and

a continuation of such an arrangement, including visitations with the respondents, is not in the best interests of the children. The children are in need of and require the security and stability which can only be afforded in the home of adoptive parents.

Relative placement is not considered a viable alternative for placement of the children, in view of the respondents' close association with relatives and the likelihood of interference by them, nor does there appear to be any evidence to show that placement of the children with relatives would be in their best interests.

Returning the children to the custody of either parent, with close supervision, does not appear to be in the best interests of the children, in that both respondents would require close and

continuous care and community resources are not available to provide the respondents necessary care and in the same environment provide care for the children.

Under no reasonable circumstances can the best interests and welfare of the children be served by continuation of the parent-child relationship.

The Court therefore concludes that it would be in the best interests and welfare of the children, M. F. P. G. F., Jr., and T. A. F. that parental rights of the respondents, P. G. F. and M. F. be terminated.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED:

1. That all parental rights of the respondents, P. G. F. and M. F. are hereby terminated and severed.

Further, the respondents, Pete G. Ferris and Mary Ferris, are divested of all rights and obligations they may have with respect to said children, and that said children are hereby released from any and all legal obligations in respect to said respondents.

2. That the guardianship of the person and the legal custody of said minor children, M. F., P. G. F, Jr., and T. A. F. is hereby transferred to the Pueblo County Department of Social Services, with full power and authority to place said children for and consent to their adoption.

Done this 12 day of May, A.D. 1975.

BY THE COURT:

(signed) Richard D. Robb
JUDGE

cc: William J. Ballas
Victor Moss
James Ripperger
Pueblo County Dept.of Social Services
P G. F
M F

APPENDIX G

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5932

JOHN DOE AND JANE ROE

v.

STATE OF DELAWARE

On Appeal From The
Supreme Court of Delaware

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide non-partisan organization of more than 200,000 members dedicated to defending the principles embodied in the Bill of Rights. The Children's Rights Project is a special project of the ACLU

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* Letters of consent from the parties to the filing of this brief amicus curiae have been filed with the Clerk of the Court.

dedicated to asserting and defending the rights of children. Central among those rights are the child's right to a stable home and to a parent-child relationship free from unwarranted state intrusion. The Children's Rights Project has participated in numerous cases throughout the United States involving the respective rights of parents and children in termination proceedings as well as cases directed at improving conditions for children who have been removed from their homes and placed in the custody of the state.

INTRODUCTION AND STATEMENT OF THE CASE

This case originated on July 2, 1975, in Delaware Superior Court when the Delaware Department of Health and Social Services (hereinafter "the Department") filed a petition seeking to terminate the parental rights of John Doe and Jane Roe with regard to their five children. On September 12, 1975, without appointing counsel to represent the children, and without considering the alternative placement options available for the children, the Superior Court summarily terminated the parents' and children's rights to continue their family relationship, upon finding that evidence concerning the parents demonstrated that they were "not fitted" to continue to exercise parental rights.[1/]

1/ The sole Delaware statutory basis for termination of parental rights presented by the Department's petition was 13 Del. Code § 1103(4), which provides for termination when:

> the parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights.

This statute is the only Delaware statute challenged by parent-appellants in this Court.

However, this initial determination was reversed and the case remanded by the Delaware Supreme Court on September 28, 1976, because the trial court had neglected to make a determination concerning whether termination of parental rights was in the "best interests of the child," which the Delaware Supreme Court held to be another "essential prerequisite for an order of termination of parental rights" under 13 Del. Code § 1108.[2/] (Appendix at 1c.)

Upon remand, and following another hearing, the trial court again terminated parental rights in a letter opinion dated December 30, 1976. (Appendix at 1d) Once again the court failed to appoint separate counsel for the children, or to investigate

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2/ 13 Del. Code § 1108 provides, in relevant part:

> (a) Should the Court find the termination of existing parental rights and their transfer to be in the best interests of the child, it shall make an order terminating such rights in the parent or parents . . . and transferring them to some other person or persons or authorized agency or the state Department of Health and Social Services as may, in the opinion of the Court, be best qualified to receive them.

(emphasis added)

the placement options available for them. The only testimony presented at the hearing on remand by any expert witness who had actually interviewed the children indicated that they had a "good relationship" with their parents. The trial court's December 30, 1976, letter opinion included the stated conclusion that "it is in the best interests of the children that" their relationship with their parents be terminated, (Appendix at 3d) as the Delaware Supreme Court had instructed, but it did not include a single word indicating why this was so. Although the particular matters considered upon remand were different, every specific finding in the December 30, 1976, trial court opinion concerned the parent's behavior and "fitness," not the children's separate "interest" in the termination.

As far as the children's separate "interest" was concerned, the proceedings upon remand were thus utterly redundant: the second trial court opinion merely recapitulated the first opinion, with the hollow addition of the single new phrase quoted above. The Delaware Supreme Court specifically noted, in reviewing the second trial court opinion, that the trial court had refused to admit or consider evidence

concerning "post foster home placement or evidence as to the State's planning for the future of the children," (Appendix at 15a) but that court nonetheless affirmed the second trial court decision on August 24, 1979.

On March 24, 1980, this Court noted probable jurisdiction of this appeal from the Delaware Court's August 24, 1979, judgment with regard to three questions: whether the Delaware statute's "not fitted" standard for terminating parental rights is unconstitutionally vague, whether parent-child relationships can be terminated by the state upon an ordinary "preponderance of the evidence" test, and whether due process requires the state to demonstrate a compelling state interest before terminating parental rights.

However, despite the five-year long history of this case, another set of critical questions concerning the individuals who have the most to gain or lose from these proceedings has not been presented to either of the courts below or raised in this Court. The decision of the Delaware Supreme Court did not merely rest upon a vague statute concerning the issue of parental "fitness." It also rested upon a conclusion that

termination of parental rights was "best" for these children, under a legal standard that was just as vague on its face as the "unfitness" statute challenged by the parent-appellants and that was applied to these children without the slightest inquiry into what the future might actually hold for them. Moreover, although the Delaware Supreme Court specifically acknowledged that parents, children, and the state have distinct interests in proceedings to terminate parental rights (Appendix at 10a-11a), it nonetheless permitted a final judgment affecting fundamental liberty interests to be entered following a trial at which only two of those three parties were represented by counsel.

These five children -- incompetent as a matter of law to represent their own interests -- thus had their most basic human rights finally adjudicated by an American court without the benefit of counsel, and without the the introduction of a scintilla of evidence to show that the essential state law pre-requisites for such a drastic and permanent curtailment of their most fundamental freedoms existed in fact. Indeed, these children's interests

are not even independently represented in this Court.

The result of the lower courts' failure to assure that the children's separate interests be represented by separate and independent counsel has been a proceeding that is fundamentally unfair, under the Constitution, and inadequate under the plain meaning of state law. Consequently, this Court should remand this case for further factual findings concerning the children's true "best" interest in a proceeding where the children are separately represented by independent counsel or a guardian ad litem. Where a statutory prerequisite for termination has not been established by evidence, and where the state's highest court has knowingly permitted a concededly separate, constitutionally cognizable interest to go wholly unrepresented, fundamental fairness requires such a remand.

This is not to concede, however, that termination of parental rights is constitutionally permissible merely upon a showing that it is in the child's "best interest" to do so. The point is, rather, that even constitutionally adequate substantive

standards may not be applied in an unfair proceeding. For this Court even to address the substantive standard on the basis of the record presented here would violate these children's due process rights.

SUMMARY OF ARGUMENT

Numerous prior holdings of this Court have acknowledged,and by now clearly established, the extraordinary protection the Constitution affords to family life.

Yet while the family as a unit has certain clearly established rights as against the state, the proper apportionment of these rights among the various members of a family still presents difficult and novel questions. Particularly difficult is the situation presented when the state seeks to intervene in a family on behalf of one family member against another. See generally, Developments in the Law -- the Constitution and the Family, 93 Harv. L. Rev. 1156, 1221-1242 (1980). In such parent-child conflicts, ordinary presumptions concerning the identity of parent-child interests, see Parham v. J.R., 442 U.S. 584 (1979), cannot be indulged. On the other hand, to concede that the normally identical interests of parent and child are in conflict whenever the state seeks to intervene -- and that the state is always fit to represent the child's interest in such situations -- is to concede the state its case before it makes a factual showing.

A review of current constitutional doctrine makes clear that children, as well as adults, have a fundamental, constitutionally-protected interest in the integrity of their family life, and that their interest is legally and practically distinct from the interests of the other parties to a parental termination proceeding (Point I). Consequently, only the mandatory provision of separate counsel to children involved in such proceedings can assure that state intervention in family life is accomplished in a manner that is fundamentally fair (Point II).

POINT I

THE CHILDREN'S SEPARATE INTEREST IN PROCEEDINGS TO TERMINATE PARENTAL RIGHTS IS CONSTITUTIONALLY "FUNDAMENTAL" AND ITS RECOGNITION BY THIS COURT IS OF THE HIGHEST PRACTICAL IMPORTANCE TO THE CHILDREN'S LIVES

A. The Prior Rulings Of This Court Clearly Establish The Fundamental Nature Of The Rights Of Parents And Children To The Integrity Of Their Families.

This Court has made it abundantly clear that individuals have a right to privacy and autonomy in their family lives that is entitled to the most rigorous substantive and procedural constitutional protection. Thus, it is beyond serious question that the family unit enjoys a right to be free of unwarranted state interference except under the most compelling circumstances.[3] See,

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[3] It is also clear, as parent-appellants have argued, that determining such fundamental rights according to an ordinary "preponderance of the evidence" test is constitutionally inadequate. It is plain that severing a parent-child relationship forever is at least as serious an abridgement of personal liberty interests as a temporary, and reversible, commitment to an institution for the mentally ill. Yet the Court has already held the "clear and convincing" standard to apply to such cases. See Addington v. Texas, 441 U.S. 418 (1979).

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e.g., Parham v. J.R., 442 U.S. 584 (1979); Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S.

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As the Court pointed out in that case,

> Increasing the burden of proof is one way to impress the fact-finder with the importance of the decision and thereby perhaps reduce the chances that inappropriate commitment will be ordered.

Addington v. Texas, supra, at 427. As this Court has already noted, "judges. . . may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." Smith v. OFFER, 431 U.S. 816, 835 (1977). Where the substantive standard for a government determination affecting fundamental rights is so intrinsically elusive and inherently subjective as those ordinarily applied in termination proceedings, "impressing the factfinder with the importance of the decision" is all the more important. In framing the analogous federal standard in this area, Congress has recently provided, with regard to Native American children, that

> No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (emphasis added). The federal standard thus requires both a higher degree of certainty on the part of the fact-finder and a more narrowly focussed factual finding than does Delaware.

494 (1977); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Although the right to privacy and autonomy in family life clearly antedates the Constitution, and is presupposed by it, it is not specifically mentioned in the Constitution. Nevertheless, the Court has found it to permeate the entire Bill of Rights, and has derived its specific holdings in this area from the First, Ninth and Fourteenth Amendments. See, Roe v. Wade, supra at 152-53. Regardless of its uncertainty concerning the precise textual basis of this right, the Court has throughout this century been completely consistent in acknowledging the existence of a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). See also Moore v. City of East Cleveland, supra, at 499; Smith v. Organization of Foster Families for Equality and Reform, supra, at 842.

The Court's consistent recognition of

this right to family integrity has frequently derived from its general concern for individual privacy, Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Roe v. Wade, supra at 152-53; Carey v. Population Services International, 431 U.S. 678, 687-89 (1977), as well as the fundamental freedom of individuals to associate without first seeking the approval of the state. See Moore v. City of East Cleveland, supra. See also Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, supra. But the Court has also specifically recognized the unique and special function the family performs in our society in a manner that is directly relevant to the issues presented here.

In Moore v. City of East Cleveland, the Court said

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Moore v. City of East Cleveland, supra, at 503-4. (footnotes omitted)

Created by history and tradition, of primary "moral and cultural" value as well as fundamental constitutional significance, the family is thus something more than just another protected legal entity.

The less serious a state intrusion into family life, of course, the less the Constitution requires by way of justification, whether the intrusion concerns state limitations on absolute parental authority, see, e.g., Prince v. Massachusetts, supra, or on the autonomy of a child. Parham v. J.R., supra. However, when the state seeks to extinguish the tie that binds parent to child permanently, only the most "powerful countervailing interest[s]" can outweigh the rights abridged by termination. See, Stanley v. Illinois, supra, at 651. When fundamental rights are absolutely threatened (as opposed to when lesser rights are merely limited), the Constitution requires that the proposed state intrusion be tailored precisely to fit the legitimate end the state seeks to achieve. Zablocki v. Redhail, supra, at 388. Consequently, when the proposed state intrusion is permanent termination of the rights of parent and child to have any relationship at all with each other and when the

declared aim of this intrusion is the child's "best interests," the state must meet a particularly heavy burden.4/

4/ Amicus sees no conflict between its position and the position of parent-appellants concerning the alleged vagueness of 13 Del. Code § 1103(4), permitting termination upon a finding that the parent is "not fitted to continue to exercise parental rights." That statute is so lacking in definiteness that a parent of common intelligence is incapable, with the best of intentions, of conforming his or her behavior to its requirements. See generally Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Of greater importance to the issues presented in proceedings to terminate parental rights, however, is that strand of the "void for vagueness" doctrine which concerns the excessive discretion accorded to administrators or enforcement officials by vague statutes. See Grayned v. City of Rockford, 408 U.S. 104 (1972). The extraordinary danger of discriminatory and arbitrary enforcement, where the government official is required to evaluate the general capacity of another person, ordinarily a member of a different social class and frequently of a different racial and cultural background from the decision-maker, in the complex and intrinsically subjective field of "good" child-rearing is self-evident. Moreover, a child whose relationship with a parent is severed unnecessarily is harmed by that loss even more than the parent. See Alsager v. District Court of Polk Co., Iowa, 406 F. Supp. 10 (S.D. Iowa), aff'd 545 F.2d 1137 (8th Cir. 1976).

Although the Court has most frequently elaborated the constitutional rights of families in the context of defending parents against the state, see, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942); Cleveland Board of Education v. LaFleur, supra; Griswold v. Connecticut, supra; Roe v. Wade, supra; Stanley v. Illinois, supra; Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, supra, a careful examination of its decisions shows that "family rights" as against the state inhere separately and reciprocally in the children as well. For example, the Court held in Smith v. Organization of Foster Families for Equality and Reform, supra, at 844 that the constitutional protection accorded to the family was based on the "emotional attachments that derive from the intimacy of daily association." It is plain that all such intimate "emotional attachments" are necessarily reciprocal ones, in which each of the participants has a linked, but plainly separate, interest. Similarly, in Quilloin v. Wolcott, supra, the primary basis of the Court's decision was the existence of a reciprocal, caring relationship form which the child actually derived ongoing emotional support

and sustenance, even though that relationship was counterposed against a "natural family" link. See, e.g., Quilloin v. Walcott, supra. In light of these holdings, and the well-established rule that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," In re Gault, 387 U.S. 1, 13 (1967), it is clear that children's interests in termination proceedings are separate from parents' interests, and are at least as significant in clearly settled constitutional terms as the interests of parents.

B. The Children's Separate Interest In Proceedings To Terminate Parental Rights Is Especially Great Because Of the Further Constitutional Deprivations Which Often Result.

Although parents and children have reciprocal, and therefore equal, interests in their "emotional attachments that derive from the intimacy of daily association," the interest of the child in proceedings brought by the state to terminate parental rights is distinguishable from the parents', and is even greater. For the parent, termination of parental rights means losing his or her "emotional attachment" with someone else. For the child, it means losing those attachments, but it also means being

swept into the permanent custody of a child welfare bureaucracy, which acquires plenary power to make unreviewable decisions affecting all of the child's constitutional and other rights. In theory, this enhanced state power will always be exercised benevolently. In practice, it is not. Consequently, it is the child, rather than the parent, who stands to lose the most in a proceeding to terminate parental rights. The child loses everything the parent loses, and usually much more.

Termination of parental rights is often justified as a necessary prerequisite to moving a child into a new adoptive home. The fact is, however, as study after study has demonstrated, that children remain for years, often throughout their entire childhood, in the legal limbo of foster care, being moved from place to place, without ever being provided with a permanent adoptive home.5/

5/ See, Children Without Homes at p. 6 (Report prepared by the Chilren's Defense Fund, 1978)

> Children remain in care for long periods of time, often moving from place to place, without the chance to experience stable caring from any adult. In our survey, 13 percent of the children had been out of

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Independent of the anguish children experience whenever they are permanently separated from their parents and siblings is the negative impact of foster care itself. Because of the shortage of dedicated and concerned foster families, states are often forced to place children inappropriately in families or impersonal institutions where their needs cannot be met.[6/] Additionally, studies indicate a high incidence of physical abuse or mistreatment

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> their own homes for over four years, and an additional 20 percent for over six years. In all, 52 percent had been in out-of-home care for two or more years. Moreover, the responding survey counties reported that 18 percent of the children in out-of-home care had been moved more than three times.

6/ See, A. Kadushin, Child Welfare Services, at 415 (McMillan & Co., 1968):

> There is still a general problem finding a sufficient number of adequate foster homes. An even greater problem is the difficulty of finding foster homes for emotionally disturbed children, mentally defective children, and children of minority racial backgrounds. The problem is further complicated by the fact that most foster parents want younger, preschool children, while many children needing foster care are older.

in such institutions or homes,[7] indicating that termination does not necessarily safeguard children from experiences that can damage them emotionally or psychologically -- and that termination may damage them even more than remaining in their natural family would have done. And even if a child is not physically abused in foster care, a child in state custody is still highly likely to be subjected with alarming frequency to the extremely damaging phenomenon

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[7] Children Without Homes at p. 6. (Report prepared by the Children's Defense Fund, 1978):

> Despite immense public concern about familial abuse, no state CDF staff visited had set up mechanisms, nor issued guidelines to monitor and eliminate the institutional abuse of children. Such abuse takes many forms: the unmonitored, excessive use of seclusion or drug therapies, severe behaviorial restrictions, or harsh physical punishment. Despite evidence that abuse of children in institutions and other group settings is widespread, no state studied had licensing statute spelling out specific sanctions for institutional abuse.

of multiple placements.[8] It is well-established that when children are moved from place to place, new attachments are severed and expectations of continuity, permanency and stability are shattered. As a result, children learn to avoid forming meaningful new relationships in order to avoid re-experiencing the trauma of separation.[9] Studies demonstrate the destructive

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[8] See, Cal. Legislature Joint Legislative Audit Comm., Report Of The State's Role Foster Care In California 7-8 (No. 148.2, 1974); H. Jeter, Children Problems and Services in Child Welfare Programs, 82 (1963); Mnookin, Foster Care - In Whose Best Interests, 43 Harv. Ed. Rev. 599, at 622-26 (1973); B. Mandell, Where Are The Children? 72, n. 10 (D.C. Heath & Co. 1973):

> A recent Seattle study showed that more than 6 of 10 foster children had undergone four or more moves. Half had been moved from four to seven times, and 12% had between eight and seventeen different placements. Only 5% remained in one home. (Jaffee and Kline, New Payment Patterns, p. 46.) Such dismal statistics clearly put the burden of proof upon the state to demonstrate that the state is, in fact, the better parent.

[9] See, Martin Wolins, "Another View of Group Care," Child Welfare, vol. 44, no. 1 (January 1965) at 15-16.

> The identity of a child in (a foster home) is often unclear, his stay is uncertain. He will probably find himself a wanderer, packing his affections, if any, and his problems and transferring them to at least several foster homes before he matures.

and potentially sociopathic consequences of such emotional trauma.[10/]

10/ J. Nemovicher, "A Comparative Study of Adopted Boys and Non-Adopted Boys in Respect of Specific Personality Characteristics," (Ph.D. dissertation, School of Education, New York University, 1959). Nemovicher compared thirty adopted boys with the same number of non-adopted boys and found that the adopted boys differed significantly from the control subjects in being more hostile, tense, dependent and fearful. See also Abraham S. Levine, "Substitute Child Care: Recent Research and Its Implications," Welfare In Review, vol. 10, no. 1, p. 3; B. Mandell, Where Are The Children?, at 72, n. 9 (D.C. Heath & Co. 1973):

> Maas and Engler [H. Maas and R. Engler, Jr., Children in Need of Parents, (N.Y.: Columbia University Press, 1959)] found that in the New England town of Brighton, foster children became more psychologically disturbed while in foster care than when they first came into care. Sixty-one percent of the foster children were confused about their identity. The children who returned home, however, were less likely to have psychological symptoms than were the children who stayed in foster care.

In addition to the harms and risks a child is exposed to while in foster care is the trauma a child invariably suffers upon being separated from a parent -- even an "unfit" one, and even when the separation has been performed in his or her "best interests."[11/] A child cannot so quickly

11/ See, J. Goldstein, A. Freud and A. Solnit, Beyond the Best Interests of the Child, 20 (1973). Petitioners' relationship with their children was terminated on the basis of evidence which failed to indicate the children had suffered or would suffer specific articulable harm were the relationship allowed to continue. In addition, the vagueness of Delaware's statues, 13 Del. Code § 1103(4) and Del. Code § 1108, invites judges to inject their own biases into the decision-making process. See, e.g., In re New England Home for Little Wanderers, 367 Mass. 631, 328 N.E.2d 854 (1975) (parental rights terminated because mother took "unrealistic" approach to problems); In re Burell, 58 Ohio St. 2d 37, 388 N.E.2d 738 (1979) (per curiam) (removal of children threatened on the basis of standards similar to Delaware's when evidence demonstrated that mother lived with male companion); Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (children removed because father was a "romantic dreamer" and lead a bohemian life style), cert denied, 385 U.S. 949 (1966).

One author suggests that termination standards like Delaware's should be discarded altogether. See, Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625 (1976); Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985 (1975). In their

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forget the memory of his parents. Even long after termination and placement in an adoptive home, children -- particularly older ones -- identify or may seek to identify with their natural parents.[12] Significantly, studies show that a child's overall well-being is directly related to the ability to identify with natural parents over and above the ability to identify with foster or adoptive parents.[13] Termination is additionally traumatic because children frequently view separation as punishment imposed for something they did wrong and about which they therefore feel guilty.[14] Because state

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place Professor Wald suggests enacting consistent standards which would require the state, courts and child welfare personnel to show actual harm to the child at all stages of state intervention. Additionally, Professor Wald's proposal requires the use of maximum efforts to keep families together prior to removal through the delivery of protective services to the home.

12/ See, E. Weinstein, Self Image of the Foster Child, pp. 16-20 (1960).

13/ See, E. Weinstein, Self Image of the Foster Child, 15 (1960).

14/ See, J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child, 20 (1973).

intrusion introduces many new authority figures into a child's life, a child may experience conflicts of loyalty and anxiety about his or her future.[15] Ideally, of course, termination should result in the expeditious placement of children in stable, happy, permanent homes where their physical and emotional needs will be met. In fact, however, reality falls far short of that ideal.[16]

15/ See, E. Weinstein, Self Image of the Foster Child, pp. 16-20 (1960).

16/ Frequently understaffed by inadequately trained personnel, applying outmoded concepts of child development and often rejecting social values dominant in the community, these [private and public] agencies operate almost totally independent of the courts in providing protective service for parents and in choosing an appropriate placement -- institutional, foster or adoptive -- for the child. . . . As a consequence, these agencies exercise almost unbridled discretion, and their decisions may or may not take into consideration those factors that should be relevant in child placement decisions. . . .

Sanford N. Katz, When Parents Fail, pp. 145-46 (Boston: Beacon Press, 1971). Numerous scholars have documented the harms that befall parents and children when the state intervenes. See, also, Mnookin, Foster Care - In Whose Best Interest, 43 Harv. Ed. Rev. 599 (1973); A.Gruber, Foster Home Care In Massachusetts: A Study of Foster Children, Their Biological and Foster Parents (1973).

When the trauma of permanent separation is aggravated by exposure to the harms and risks of foster care, a child stands little chance of growing up to be a healthy and productive human being. The most benevolently motivated termination decision may end one trauma but initiate many others. Because the rights implicated by termination are so fundamental, and its effects so far-reaching, the necessity for careful, precise, objective fact-finding cannot be overstated. A decision of this magnitude should plainly follow only the most exacting judicial scrutiny. To deny a child the most fundamental right and a fundamental relationship without due process of law, and to open the door to abuses that are all the more alarming because they are committed in the unreviewable discretion of the state -- and in the child's own name.

POINT II

FUNDAMENTAL FAIRNESS REQUIRES THE APPOINTMENT OF SEPARATE COUNSEL TO REPRESENT CHILDREN IN PROCEEDINGS WHICH MAY RESULT IN TERMINATION OF THEIR RIGHTS TO FAMILY INTEGRITY

This Court has repeatedly held the right to counsel to attach when a judicial proceeding brought by the state may result in a serious deprivation of liberty to a citizen. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979). The Court has, in addition, specifically held that minors as well as adults are entitled to the benefit of this right, and that it applies in nominally "civil" cases initiated by the state in the exercise of its parens patriae power just as it does in nominally "criminal" cases. In re Gault, 387 U.S. 1 (1967). Moreover, although In re Gault involved a delinquency proceeding rather than a parental neglect or termination proceeding, in the Gault opinion, the Court quoted with approval a New York statute providing children with "the assistance of counsel of their own choosing or of law

guardians in neglect proceedings." 387 U.S. at 40.

The specific holding of Gault is plainly applicable to this case. There the Court said:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parenst must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

387 U.S. 41. Gault involved "proceedings to determine delinquency," but Gault itself held that the name given by the state to a particular proceeding does not govern or define the constitutional rights implicated by the proceeding. Under the prior holdings of this Court, see Parham v. J.R., supra, the law of Delaware, and the law of numerous other states, the state acquires the unreviewable power to commit the child for whom it is the sole legal guardian to any number

of "institutions in which the juvenile's freedom is curtailed" -- such as mental institutions, hospitals, and possibly, as in Gault, "training schools" -- without ever having to appear before a court again. Thus, for the Roe children, the termination proceeding implicates, or may implicate,[17/] all of the same liberty interests as the delinquency proceedings at issue in Gault and, as demonstrated above, many additional liberty interests as well. See also Wisconsin v. Yoder, 406 U.S. 205, 243 (1972)(Douglas, J., dissenting in part).

It is precisely in recognition of such considerations that a study by the Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, Standards Relating to Abuse and Neglect, has proposed

> Appointment of counsel for child. Upon filing, the court should be required to appoint counsel at public expense to represent the child identified in the petition, as a party to the proceedings. . . ,

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17/ The record below, unreliable and underdeveloped as it is, still clearly suggests that at least one of the Roe children, Charles, may be retarded or handicapped.

and why the official Commentary on that provision explains

> There are good reasons to believe that this guarantee is constitutionally mandated in light of the significant consequences to the child if court wardship were ultimately imposed. . . . The reasoning underlying the Supreme Court's mandate of counsel for minors in In re Gault, 387 U.S. 1 (1967) thus applies readily to minors involved in wardship proceedings.

The necessity for requiring the appointment of counsel or of a law guardian in all termination and neglect proceedings as a matter of due process is well illustrated by the course of proceedings here. Delaware already has a local rule permitting the appointment of counsel to represent a child in the discretion of the trial court. Delaware Family Court Rule 360 provides that:

> The Court, at any stage of a proceeding, may appoint a guardian ad litem for a child if he has no parent or custodian appearing on his behalf, or the interests of the parent or custodian appear to conflict with those of the child.18/

18/ Despite this Court's clear holding in In re Gault, supra, that the Constitution requires the appointment of counsel in all delinquency proceedings, Del. Fam. Ct. R. 230 still provides that the right to counsel in such proceedings is also a matter of judicial discretion.

But as this Court said in Gault, "Nor can the judge represent the child," 387 U.S. 36, as this case amply demonstrates. Here, the trial judge, who had unilateral discretion under local law to consider and decide whether the children's interests required the appointment of counsel, initially neglected even to refer to -- let alone consider and evaluate -- those interests, even in this final and drastic context. And the trial judge's second opinion merely incanted the proper statutory language with no factual findings to support it and without hearing any evidence that could have supported any factual findings it might have made. In short, permitting the appointment of counsel for the child to rest in the discretion of the trial court often offers no protection for the child at all.

The record in this case thus once again juxtaposes the benevolent intentions of the Progressive era reformers who created modern family and juvenile court practice in this country with the institutional realities of twentieth century social welfare systems. Foster care, like the "training schools" at issue in Gault, is intended to benefit children, but in fact in many, many cases

it severely restricts personal liberty and has no "saving" or therapeutic effect at all. See Point IB, supra, and the authorities cited there. Because the interests of the children involved are so fundamental, and because, as this case illustrates, trial judges cannot be expected always to recognize potential conflicts of interest among the other parties' interests and those of the children, only an explicit holding that the Constitution mandates the separate representation of children in all termination proceedings will suffice to insure the protection of those interests.

The practical importance of separate counsel in trial court termination proceedings to the five children whose lives are at stake here is apparent from the record below. This is not a case in which the appointment of counsel would have been a hollow formalism. Separate representation may well have changed the outcome in this case. The failure of the lower courts to assure separate representation for these children is not only sufficient cause, by itself, for vacating the judgment below and remanding this case, but it has also led to other easily identifiable errors and omis-

sions which are, independently, of such separate constitutional magnitude as to require vacating the judgment below.

The most obvious of these other constitutional errors concerns the Delaware statutory requirement that the Court find that termination of parental rights be in the child's "best" interest. The Delaware statute requiring such a finding has not been challenged on grounds of vagueness either here or below, even though it is plainly no more certain in meaning than the "not fitted" element parent-appellants have chosen to attack on vagueness grounds.[19/]

19/ Indeed, the only provision of Delaware law that illuminates the legal meaning given by that state to the vague and ambiguous social work catchphrase "best interests of the child" in fact supports separate consideration of the individual child's desires and future prospects. Under a section of the Delaware Code having to do with private custody disputes, "best interests of the child" is defined to encompass,

> all relevant factors, including:
> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (4) the child's adjustment to his home, school, and community, and,

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In addition, appointment of separate counsel to represent the children would almost surely have avoided another fatal defect in these proceedings: the failure of any evidence to be adduced that would indicate that terminating parental rights would be "best" for them. The "best" interests standard is intrinsically comparative. The Oxford English Dictionary defines the word "best," for example, as "of the highest excellence; excelling all others in quality" (emphasis added). Webster's Seventh New Collegiate Dictionary defines "best" as "excelling all others." (emphasis added). Yet the lower court made no inquiry into the realistic alternative placements available for these children or any findings concerning

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> (5) the mental and physical health of all individuals involved.

13 Del. Code § 722(a)(emphasis added). The Delaware Supreme Court has held this statute to require a "broad inquiry" into the child's situation in proceedings to terminate parental rights, Matter of Three Minor Children, 406 A.2d 14 (Del. Sup. Ct. 1979), an inquiry which was plainly not conducted here.

whether those alternatives were "better" than terminating parental rights -- let alone "best." These children's most basic constitutional and human rights were thus adjudicated without considering any evidence going to what the Delaware Supreme Court has itself denominated an "essential pre-requisite" for such an adjudication. Under the principles enunciated by this Court in Thompson v. Louisville, 362 U.S. 199 (1960) and reiterated in Vachon v. New Hampshire, 414 U.S 478 (1974), the Delaware judgment appealed from here was therefore rendered in violation of the due process clause because it is "based on a record lacking any relevant evidence as to a crucial element," Vachon v. New Hampshire, supra at 480, in a matter concerning the most fundamental of human rights.

As this case illustrates, the benevolent theories of parens patriae intervention in family life have long ago broken down in practice, and are vulnerable to constitutional attack on numerous grounds. See Developments in the Law -- The Constitution and the Family, supra at 1221-1242. Even if none of the grounds raised by parent-appellants suffices to vacate or reverse the judgment below, the lower courts' failure effectively to consider the children's

interests, or to see to it that those interests were independently developed or presented, requires vacating the judgment below. The primary due process interests at issue in this case have not even been raised or briefed. On this record, it would be fundamentally unfair for the Court to permit a final adjudication concerning those interests to stand.

CONCLUSION

For the reasons set forth above, this Court should vacate the judgment of the Court below and remand this case for further proceedings in which the children are represented by separate counsel.

Respectfully submitted,

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